IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.3 OF 2002

1.Vijay Dadasaheb Bhosle,
aged 21 years, residing at
Kajala, Tal.Badnapur,
Dist.Jalna.

2.Baban Mahadeo Bharti,
aged 24 Years, residing at
Kajala, Tal.Badnapur, ...Appellants/
Dist.Jalna. Accd.Nos.1 & 2

(Both Appellants in
Nasik Central Jail)

Versus

The State of Maharashtra,
Through Sinnar Police Station,
Sinnar, Dist.Nasik ...Respondent

AND

CRIMINAL APPEAL NO.4 OF 2002

1.Raosaheb Manikrao Thakare,
aged 26 Years, residing at-
Kajala, Tal.Badnapur,
Dist.Jalna.

2.Sanjay Manjaram More,
aged 23 Years, residing at-
Kajala, Tal.Badnapur,
Dist.Jalna.

3.Manjaram Dagadu More,
aged 50 Years, residing at-
Kajala, Tal.Badnapur,
Dist.Jalna.

4.Sanjay Vishwanath Gaikwad,
aged 20 Years, residing at-
Kajala, Tal.Badnapur, ...Appellants
Dist.Jalna. Accd.Nos.3 to 6

(All Appellants in Nasik Jail)

Versus

The State of Maharashtra ...Respondent

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Mr.Ramesh Dube Patil for Appellants.

Mr.V.B.Konde-Deshmukh, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 22, 2006.

ORAL JUDGMENT :

1. These Appeals can be disposed of by common Judgment, as both Appeals are directed against the decision of the 3rd Ad-hoc Additional Sessions Judge, Nasik dated December 1, 2001 in Sessions Case No.103 of 2001. The Appellants were charge-sheeted and tried for offence punishable under Sections 395, 397, 342 and 427 of the Indian Penal Code (hereinafter referred to as 'IPC').

2. The prosecution case is that on 30th March 2001, informant Bharat Patil went to his duty at

about 8.00 hrs. and after completing his work, he returned home at 16.00 hrs. He took meal at 10.30 p.m. and went to bed. His daughter Ujjwala, son Sachin and wife Mangala were watching movie on television. At about 11.30 p.m., door of his house was knocked by 10 to 12 unknown persons. It is the prosecution case that Bharat Patil got up from his bed, when the door was opened by his daughter Ujjwala. The unknown persons rushed into the house of Bharat Patil, who were armed with sticks, iron rods and knives etc. Out of those intruders, one of them asked informant's wife Mangala to take out valuable property. One of the intruders gave blow of iron rod on the right shoulder of the informant, the other intruders also assaulted the informant by means of stick on his head. Thereafter, the said intruders opened the cupboard and scattered the articles kept therein. At the point of knife shown to the informant's wife and threat to kill her, the intruders forced open the locker of the cupboard and took away cash of Rs.1,500/- (Rupees One Thousand Five Hundred) as also gold ornaments on the person of his wife. It is the prosecution case that the said assailants, after ransacking the

house of Bharat Pail and of Kamalkangane and Yamunabai Hande, came in front of the house of Sampat Jadhav at about 12.10 hrs. and on seeing three vehicles parked in front of the house (trax bearing No.MH-15-K-6683, motor cycle bearing No.MH-15-AC-3927 and one scooter bearing No.BTE-4320), proceeded to puncture those vehicles, so that the victims should not use the same to chase them. It is not necessary to elaborate the prosecution case further, except to mention that complaint was recorded in the local Police Station. On receiving such information, First Information Report (F.I.R.) was registered and investigation commenced.

3. The other relevant event for deciding the present Appeals is that of arrest of respective accused during the course of investigation. Accused No.1 came to be arrested on 20th April 2001. Accused Nos.2 and 3 were arrested on 1st May 2001. Accused No.4 was arrested on 16th May 2001 and accused Nos.5 and 6 were arrested on 21st May 2001. However, the test identification parade of all these accused were held together on 21st June

2001. The test identification parade was conducted by (PW 4) Bhanudas Pandurang Gaikwad- Executive Magistrate on the request of the Investigating Officer B.G.Kotkar. The Trial Court, on analysing the evidence on record, proceeded to convict the Appellants/accused 1 to 6 for offence punishable under Section 395 of the IPC and ordered that they should suffer sentence of rigorous imprisonment for seven years and to pay fine of Rs.500/- (Rupees Five Hundred) each, in default, to suffer further rigorous imprisonment for three months. Appellants/accused 1 to 6 are also convicted of the offence punishable under Section 342 read with Section 34 of the IPC and sentenced to suffer rigorous imprisonment for six months. The Appellants/accused are, however, acquitted for the offences punishable under Section 395 read with Section 397 and Section 427 read with Section 34 of the IPC. This decision is subject matter of challenge in the present Appeals. Appeal No.3 of 2002 is filed by accused Nos.1 and 2 and Appeal No.4 of 2002 is filed by accused Nos.3 to 6.

4. Having considered the rival submissions,

in my opinion, these Appeals can be disposed of by common Judgment. Counsel appearing for the Appellants/accused in both these Appeals have essentially addressed this Court on three issues. The first point is that the test identification parade is vitiated; firstly because there is inordinate unexplained delay in the conduct of the test identification parade and secondly because no proper procedure has been adhered to during the said test identification parade. The second point urged before this Court is that the procedure of discovery of stolen property at the instance of two accused is improper. It is also contended that discovery of stolen property is at the instance of only two accused being accused Nos.3 and 4, for that, the other accused cannot be proceeded with. The third contention before this Court is that originally the offence was registered as one under Section 394 of the IPC but has been subsequently converted to Section 395 of the IPC, presumably on the basis of statement of one of the accused. Although three contentions have been raised, Counsel for the Appellants/accused submits that these Appeals should succeed on the first point

referred to earlier regarding test identification parade as conducted was vitiated.

5. After hearing Counsel for the parties and going through the record, in my opinion, Counsel for the Appellants is right in contending that the Appellants/accused ought to succeed on the argument that the test identification parade as held, was vitiated and in which case, there was no legal evidence to indicate the complicity of the Appellants in relation to the alleged offence. As the factum of valid test identification parade has not been established by the prosecution, the prosecution case against the Appellants/accused should fall to the ground. Accordingly, I shall proceed to consider the first aspect regarding the test identification parade as held in the present case is vitiated.

6. I have already adverted to the different dates on which respective accused came to be arrested. The first arrest was of accused No.1 on 28th April 2001 and the last arrest was of accused Nos.5 and 6 on 21st May 2001. In fact, the

prosecution was obliged to hold test identification parade in respect of each of the accused soon after their arrest and not wait till the arrest of all the accused were effected. In the first place, the Investigating Officer has not deposed in his evidence that he preferred to defer the holding of test identification parade of the arrested accused because other accused were yet to be arrested. Assuming that the Investigating Officer was misdirected in waiting till the arrest of the last accused involved in the case was effected, even then, there is no explanation whatsoever as to what prevented the Investigating Officer to ensure that test identification parade is held soon after 21st May 2001. Instead, the test identification parade of all the accused is held on 21st June 2001. Let us now analyse the evidence of the Investigating Officer (PW 11) in this regard.

7. As mentioned earlier, he has not given any justification as to why the test identification parade was held after such a long time. All that he has mentioned in the examination-in-chief is that the test identification parade of the accused

was conducted by Tahsildar Gaikwad. In other words, there is no legal evidence explaining the circumstances which prevented holding of test identification parade soon after the arrest of respective accused and in any case, for not conducting the test identification parade at least immediately after the last arrest of accused Nos. 5 and 6, made on 21st May 2001. Instead, the test identification parade was held on 21st June 2001. Counsel for the Appellants/accused has justly relied on the exposition of the Apex Court in the case of **Subash & Shiv Shankar vs. State of U.P. reported in AIR 1987 SC 1222**. Even in that case, the accused Raj Kishore was arrested on 23rd May 1971 and another accused Shiv Shankar was arrested on 14th June 1971; whereas, their test identification parade was held three weeks after their arrest and no explanation was offered for the delay in holding such belated test identification parade. The Apex Court in Para 8 of the reported Judgment proceeded to hold that therefore there was room for doubt as to whether the delay in holding the test identification parade was in order to enable the witnesses to see the accused in the

police lock up or in the jail premises and make a note of their features. In Paragraph 9 of the reported Judgement, the Apex Court has then observed that there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses have seen the accused for a few minutes and the date of test identification parade. It is also noted that it is no doubt true that all the three witnesses had correctly identified accused Shiv Shankar at the test identification parade, but it has to be borne in mind that nearly four months had elapsed from the date of incident. The Apex Court has then adverted to its earlier decision in the case of Muthu Swami vs. State of Madras AIR 1954 SC 4, in which case, identification parade was held about two and a half months after the occurrence, wherein, it was held that it would be unsafe to place reliance on the identification of the accused by the eye-witnesses. On this count alone, the concerned accused came to be acquitted.

8. Even in the present case as is noted earlier, the incident in question had occurred on

the night of 30th March 2001, whereas the test identification parade was held on 21st June 2001, which is almost around three months from the date of incident and two months from the arrest of the first accused and one month from the date of last arrest of accused. Applying the exposition of the Apex Court in the aforesaid decision, benefit of doubt will have to be given to the Appellants. Moreso because, no explanation whatsoever has been offered by the prosecution (Investigating Officer PW 11) as to the circumstances due to which the test identification parade could not be held immediately after the arrest of the respective accused and in any case, soon after the last arrest made on 21st May 2001 of accused Nos.5 and 6. In the case before the Supreme Court, three weeks delay in conducting test identification parade after the date of arrest was found to be fatal. Even in the present case, the same principle will apply as there was possibility that delay in holding the test identification parade has resulted in exposing the accused being seen by the witnesses before the test identification parade was held. The possibility of exposure of the accused before

the conduct of the test identification parade is specifically put to the Investigating Officer during the cross-examination. The Investigating Officer (PW 11) has accepted that finger prints of the accused and photographs of the accused were taken after their arrest. Further the photographs of the accused were exhibited on the wall of the Police Station and also the fact that witnesses were frequently going to the Police Station to know the developments of the case. Suggestion is also made to the Investigating Officer (PW 11) that accused were shown by him to the witnesses and that the lock up was in front of the Police Station. Indeed, this suggestion has been denied. The witness has then volunteered that the photographs of the accused were displayed on the wall of the Police Station after filing the charge-sheet against them. But this explanation remains in the realm of doubt, for which, benefit of doubt will have to be given to the accused by taking the view that the test identification parade in the present case has vitiated.

9. The second aspect for challenging the test

identification parade as contended by the Appellants/accused was on the argument that the same was in utter disregard of the established norms for conducting the test identification parade. Reliance was placed on the norms spelt out in the Criminal Manual in the following terms:

> "(i) The witnesses should be prevented from seeing the suspect before he is paraded with other persons, and witnesses who have previously seen a photograph or description of the suspect should not be led in identifying the suspect by reason of their recollection of the photograph or description, as for instance by being shown the photograph or description, before the parade.
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> (ii) The suspect should be placed among persons (if practicable eight or more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. Two suspects of roughly of similar appearance should be paraded with atleast twelve other persons. Where, however, the two suspects are not similar in appearance or where there are more than two suspects, separate parades should be held using different person on each parade.
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> (iii) The witnesses should be introduced one by one and, on leaving, should not be allowed to communicate with witnesses waiting to see the persons paraded; and the suspect should be informed that he is free to change his position after each witness has left."

10. It is contended that from the evidence which has come on record, it can be demonstrated that there is probability that the witnesses had the benefit of seeing the respective accused persons before the test identification parade was held. This is so because the faces of respective accused were not covered when they were brought to the Chamber of the Executive Magistrate (PW 4). Besides, they were kept in sub-jail where they could be easily seen. Moreover, the Executive Magistrate (PW 4) has conceded in his evidence that he had no idea about the description of the accused persons for which reason, it is obvious that selection of the dummies by the Executive Magistrate was not done by adhering to the requirements of the established norms.

11. Besides this argument, it is also contended that in fact, the test identification parade panchanama will have to be discarded and cannot be looked into. This is so because the two persons who acted as Panchas in the test identification parade have not been examined by the

prosecution. Moreover, the scribe, who has taken down the dictation of Executive Magistrate and prepared the panchanama, also has not been examined. On this basis, it is contended that fatal infirmity is committed in the conduct of the test identification parade and the inevitable conclusion is that the evidence regarding test identification parade will have to be discarded.

12. Having considered the rival submissions on this aspect, I will examine the challenge by first considering the argument as to the effect of non-examination of panch witnesses as also scribe of the panchanama. In my opinion, the prosecution was obliged to examine the scribe of the panchanama. Non-examination of the scribe is fatal to the prosecution case. Indeed, it is argued on behalf of the State that although the panchanama has been scribed by Sachin Potdar, Clerk of the Executive Magistrate, however, the document is not only signed by the Executive Magistrate (PW 4) himself, but he has proved the said document in Court. In the present case, as is observed earlier, the prosecution has not only failed to

examine the scribe of the panchanama, but also the two panchas, whose evidence was crucial, especially having regard to the nature of controversy raised by the defence. Assuming that the efficacy of the test identification parade conducted by the Executive Magistrate (PW 4) is to be considered on the basis of his evidence, even in that case, the inevitable conclusion on the analysis of evidence of PW 4 is that, the test identification parade as conducted, will have to be ignored and discarded. This is so because, in his examination-in-chief, he has deposed that as he was called upon to hold the test identification parade, he directed the Jailor to produce the accused in his office on 21st June 2001. He also directed the Police Station, Sinnar to produce witnesses on the same date and place. He then states that six witnesses were produced to identify the accused who were asked to wait in a room which was near his Chamber. Thereafter, accused were produced at about 2.00 p.m. and they were kept in sub-jail which is near his Office. He then sent for two panchas and apprised them that they were required to act as panchas for conducting test identification parade. The Panchas were

called in his Chamber. It is then stated that one Panch was asked to bring one accused from the sub-jail. Six dummies of the same age, height and general appearance like the accused were called in the Chamber. The dummies were directed to stand facing towards North in the Chamber. Then accused Punjaram More was allowed to stand as per his wish in between the dummy persons by permitting him to select is own position. Thereafter, witnesses were called one by one in his Chamber to identify the said accused and each of them identified the said accused. The witnesses after identifying the accused were asked to sit nearby his Chamber. Similar procedure was followed with regard to the other accused as can be seen from the examination-in-chief. In the cross-examination, it is suggested to this witness that informant Bharat Patil as well as other witnesses had opportunity to see the accused persons when they were lodged in the sub-jail, which he has denied. He has accepted that the accused were brought to the Jail in the Police Van. That the dummy persons were selected from nearby, who had come to attend Tahsildar's Office on the said date. He has also admitted that

as per his dictation, the Memorandum of Panchanama was prepared by his Clerk Sachin Potdar. He has further admitted that all the panchanamas were not sealed by him while they were handed over to the Police Station. Indeed, this is a fatal mistake. Suggestion is given to this witness that the Panchanama Exhibits 37 to 42 were handed over on 22nd June, 1999 to the Police, as they were prepared later. He has admitted in the cross-examination that the Office of the Tahasildar is having big windows and one door, that the treasury office is in front of Police Station and sub-jail is near the treasury office. He has admitted that he did not himself send any official to call the witnesses. He has also admitted that neither he, nor his staff had any idea of general appearance of the accused persons before the test identification parade was commenced. He has then stated that the accused were brought up to his Chamber from the sub-jail by the Police Guards. Suggestion is given to this witness that Police Guards were standing inside his Chamber at the relevant time, which suggestion has been denied by him. However, he admits that the faces of the

accused were not covered by the clothes when they were brought from the sub-jail to his Chamber. This admission, amongst other admissions, is crucial to doubt the efficacy of the test identification parade as conducted. He has also admitted that there are iron rods to the door and windows of the sub-jail and outside person can see the accused who are kept inside the sub-jail. He then contradicts himself by saying that there is no window to the sub-jail. Suggestion is given to him that the test identification parade was conducted earlier and the panchanamas were prepared later, which suggestion has been denied. He also admits that the witnesses took two to three minutes time in arriving in his Chamber and to identify the accused. He also admits that there is door in between his Chamber and his ante Chamber. He, however, asserts that each panchanama was completed within fifteen minutes. Here it may be noted that each accused was paraded before six witnesses. It is inconceivable that the panchanama can be completed within fifteen minutes, having regard to the time taken for one witness to come inside and identify the accused, which process was required to

be repeated six times.

13. On analysing the evidence of the Executive Magistrate (PW 4), I am in agreement with the challenge put forth by the Appellants that the prosecution did not take sufficient precaution so as to prevent the witnesses from seeing the suspects before they were paraded with other persons. Moreover, from the evidence of the Investigating Officer (PW 11), it is seen that the photographs of the accused were exhibited on the wall of the Police Station and that the witnesses were frequently visiting the Police Station. I am conscious of the fact that the Investigating Officer has volunteered to say that the photographs were so exhibited only after filing of the charge-sheet. Besides, there is no evidence whatsoever that when the witnesses who came to identify the suspects, while leaving, were instructed that they should not communicate with other witnesses waiting to see the persons paraded or that the suspect was informed that he was free to change his position after each witness had left. There is no evidence to this effect. It was

necessary for the prosecution to establish this position. In absence whereof, the claim of the Appellants that the test identification parade is vitiated, will have to be accepted. Considering the totality of the evidence on record, especially of the Investigating Officer (PW 11) and of the Executive Magistrate (PW 4), which is the only relevant evidence to consider the efficacy of the test identification parade conducted in the present case, I have no hesitation in taking the view that the procedure adopted is replete with fatal infirmities.

14. As the prosecution case is that the intruders in the house of the informant were unknown persons, identification of such intruders at the test identification parade was prerequisite. As the prosecution has failed to establish that aspect, it necessarily follows that the Appellants/accused persons will have to be given benefit of doubt. The fact that some of the stolen property has been recovered from the two accused, will be of no avail because the participation of those two accused in the commission of the crime in

question has not been established by the prosecution beyond reasonable doubt. In such a case, the said two persons, at best, could have been prosecuted for offence of possessing stolen property but that is not the charge against them and the specific case of the prosecution was that those two persons/accused Nos.3 and 4 had participated in the commission of the crime, which charge has failed against the said accused for the reasons already recorded earlier.

15. The Trial Court has considered the issue regarding test identification parade in Paragraph 26 of the impugned Judgment. Learned A.P.P. fairly accepts that there is no observation in the impugned Judgment which would be relevant to consider the point in issue. The Trial Court ought to have referred to all these aspects. In other words, the Trial Court has committed manifest error in proceeding to record finding of guilt.

16. Accordingly, both these Appeals succeed. The impugned Judgment and Order passed by the Trial Court is set-aside. Appellants/accused are

acquitted of the offence punishable under Section 395 and Section 342 read with Section 34 of the Indian Penal Code, of which, they were found guilty by the Trial Court.

17. Accused Nos.3 and 4 are directed to be set at liberty forthwith, unless required in some other offence, as they are in Jail. Bail-bonds in respect of accused Nos.1, 2, 5 & 6 to stand cancelled.

A.M.KHANWILKAR, J.